

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
AT&T Corporation,)	
)	
Complainant,)	
)	
v.)	File No. E-97-04
)	
Beehive Telephone Company, Inc.)	
and Beehive Telephone, Inc. Nevada,)	
)	
Defendants.)	
)	
- and -)	
)	
Beehive Telephone Company, Inc.)	
and Beehive Telephone, Inc. Nevada,)	
)	
Complainants,)	
)	
v.)	File No. E-97-14
)	
AT&T Corp.,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 2002

Released: June 20, 2002

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order ("Order"), we resolve two complaint proceedings that we have consolidated for administrative convenience.¹ First, we grant in part

¹ *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, and *Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada v. AT&T Corp.*, Letter from Russell D. Lukas, Counsel for Beehive Telephone Co., to Thomas D. Wyatt, Associate Chief, Enforcement Division, Common Carrier Bureau,

and dismiss and deny in part a formal complaint that AT&T Corporation (“AT&T”) filed against Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada (collectively, “Beehive”) pursuant to section 208 of the Communications Act of 1934, as amended (“Act” or “Communications Act”).² Second, we dismiss and deny in its entirety a formal complaint that Beehive filed against AT&T pursuant to section 208 of the Act.³

2. In its complaint, AT&T alleges that Beehive exceeded its authorized rate of return and engaged in various unlawful billing practices, in violation of sections 201(b)⁴ and 203(c)⁵ of the Act.⁶ In addition, AT&T alleges that an access revenue-sharing arrangement between Beehive and an information service provider to which Beehive terminated traffic breached Beehive’s common carrier duties, in violation of section 201(b) of the Act,⁷ and constituted unreasonable discrimination, in violation of section 202(a) of the Act.⁸ We grant AT&T’s claims that Beehive violated section 203(c) of the Act by failing to comply with various billing requirements of Beehive’s effective tariff. We also grant AT&T’s claims that Beehive violated section 203(c) of the Act by failing to comply with its tariff’s requirements regarding billing access charges based upon call attempts, but only as to liability and not as to damages. We further grant AT&T’s claims that Beehive exceeded its authorized rate of return, but only as to liability and not as to damages. Finally, on the basis of the facts and arguments presented in this record, we deny AT&T’s claims regarding the access revenue-sharing arrangement between Beehive and the information service provider, because AT&T has failed to meet its burden of demonstrating that this arrangement violated either section 201(b) or section 202(a) of the Act.⁹

FCC, File Nos. E-97-04, E-97-14 (dated Jan. 21, 1998) (confirming that the parties agreed to the consolidation of these complaint proceedings during a conference call held with Commission staff on January 9, 1998).

² 47 U.S.C. § 208. *See AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Verified Complaint, File No. E-97-04 (filed October 29, 1996) (“AT&T Complaint”).

³ *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone, Inc. Nevada*, Cross Complaint, File E-97-14 (filed March 25, 1997) (“Beehive Complaint”).

⁴ 47 U.S.C. § 201(b). Section 201(b) of the Act provides, in pertinent part, that “[a]ll charges [and] practices . . . in connection with such communication service shall be just and reasonable, and any such charge [or] practice . . . that is unjust or unreasonable is hereby declared to be unlawful.” 47 U.S.C. § 201(b).

⁵ 47 U.S.C. § 203(c). Section 203(c) of the Act states that a carrier must provide communications services in strict accordance with the terms and conditions contained in its tariff. 47 U.S.C. § 203(c).

⁶ AT&T Complaint at 9-12, ¶¶ 28-47.

⁷ AT&T Complaint at 6-8, ¶¶ 16-23.

⁸ 47 U.S.C. § 202(a). *See AT&T Complaint* at 8, ¶¶ 24-27. Section 202(a) of the Act makes it unlawful “for any common carrier to make any unjust or unreasonable discrimination in charges, practices, . . . facilities, or services for or in connection with like communication service . . . or to make or give any undue or unreasonable preference or advantage to any particular person.” 47 U.S.C. § 202(a).

⁹ *See generally Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000) (affirming that the complainant in a proceeding conducted under section 208 of the Act bears the burden of proof). We also dismiss as moot AT&T’s billing claims under section 201(b) of the Act, because they are based on the same facts, and seek the same relief, as the claims under section 203(c) that we grant.

3. In its complaint, Beehive alleges conditionally that, if (and only if) the Commission grants AT&T's claims that Beehive's access revenue-sharing arrangement was unlawful, then the Commission must also grant Beehive's claims that certain of AT&T's billing arrangements with customers violated sections 201(b), 203, and 228 (the Telephone Disclosure and Dispute Resolution Act ("TDDRA")) of the Act for precisely the same reasons.¹⁰ Beehive also alleges that AT&T violated sections 1.17¹¹ and 1.729(b)¹² of the Commission's rules by failing to disclose certain information in the AT&T Complaint proceeding.¹³ Because we deny AT&T's claims that Beehive's access revenue-sharing arrangement was unlawful, the condition precedent pled by Beehive has not been satisfied, and thus we dismiss Beehive's claims under sections 201(b), 203, and 228 of the Act. In addition, we deny Beehive's claims under sections 1.17 and 1.729(b) of the Commission's rules, because Beehive has failed to meet its burden of demonstrating that AT&T deliberately failed to disclose material information in the AT&T Complaint proceeding.

II. BACKGROUND

4. At all relevant times, Beehive was an incumbent local exchange carrier ("LEC") located in rural Utah and Nevada that served approximately 700 access lines.¹⁴ Beehive provided local exchange service to end user customers, and exchange access services to AT&T and other interexchange carriers ("IXCs").¹⁵

5. Prior to March 31, 1994, Beehive charged IXCs access rates at the levels contained in the interstate access tariff filed by the National Exchange Carrier Association ("NECA") on behalf of its member companies.¹⁶ The NECA tariff specified a rate of

¹⁰ Beehive Complaint at 9-10, 12-13, ¶¶ 34-40, 54-61.

¹¹ 47 C.F.R. § 1.17. Section 1.17 of the Commission's rules forbids a carrier from making "any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission." 47 C.F.R. § 1.17.

¹² 47 C.F.R. § 1.729(b) (1996). At the relevant time, section 1.729(b) of the Commission's rules required interrogatories to be answered "fully in writing under oath or affirmation." *Id.* That obligation now appears in section 1.729(e) of our rules. 47 C.F.R. § 1.729(e) (2001).

¹³ Beehive Complaint at 10-12, ¶¶ 41-53.

¹⁴ AT&T Complaint at 2-3, ¶¶ 2-3, 5; *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Answer, File No. E-97-04 (filed December 18, 1996) at 1-2, ¶¶ 2-3, 5 ("Beehive Answer"); *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Brief for Defendants, File No. E-97-04 (filed June 5, 1997) at 3 ("Beehive Initial Brief"); Beehive Complaint at 1, ¶¶ 1-2.

¹⁵ AT&T Complaint at 2-3, ¶¶ 2-3, 5; Beehive Answer at 1-2, ¶¶ 2-3, 5; *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Initial Brief of AT&T Corp., File No. E-97-04 (filed June 5, 1997) at 1 ("AT&T Initial Brief").

¹⁶ AT&T Complaint at 3, ¶ 6; Beehive Answer at 2, ¶ 6; AT&T Initial Brief at 1.

approximately \$.07 per terminating access minute.¹⁷ On March 31, 1994, pursuant to section 61.39 of the Commission's rules,¹⁸ Beehive withdrew from the NECA tariff and filed its own interstate access tariff ("Tariff") specifying a terminating interstate access rate of \$.47 per minute.¹⁹ That Tariff became effective on July 1, 1994.²⁰ Although it contained its own access rates, Beehive's Tariff explicitly incorporated the non-rate regulations, terms, and conditions for access services set forth in NECA's Tariff F.C.C. No. 5.²¹ As of July 1, 1995, Beehive reduced its interstate access rate to \$0.14 per terminating minute.²²

6. In October, 1994, Beehive entered into an access revenue-sharing arrangement with Joy Enterprises, Inc. ("Joy"), an information service provider to which Beehive terminated traffic.²³ Initially, the compensation arrangement required Beehive to pay Joy \$.04 per access minute for each long distance call terminated to Joy; eventually, in October, 1995, the compensation was adjusted to a flat-rate of \$84,000 per month.²⁴ Subsequently, in January, 1997, the amount was reduced to \$42,000 per month.²⁵

¹⁷ AT&T Complaint at 3, ¶ 6; Beehive Answer at 2, ¶ 6; AT&T Initial Brief at 1-2.

¹⁸ 47 C.F.R. § 61.39 (permitting certain small local exchange carriers to base their tariffed access rates upon historic costs and revenues).

¹⁹ AT&T Complaint at 3, ¶¶ 6-7; Beehive Answer at 2, ¶¶ 6-7; AT&T Initial Brief at 1-2; Beehive Initial Brief at 3.

²⁰ AT&T Complaint at 3, ¶ 7; Beehive Answer at 2, ¶ 7; AT&T Initial Brief at 2.

²¹ AT&T Complaint at 11, ¶ 44; Beehive Answer at 7-8, ¶ 44; Beehive Initial Brief at 23-24; AT&T Initial Brief at 22. Beehive's current Tariff is available on the Commission web site at <http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/ccb/etfs/webpublic/search.htm>.

²² AT&T Complaint at 4, ¶ 11; Beehive Answer at 3, ¶ 11; AT&T Initial Brief at 4. At about that same time, AT&T began to refuse to pay some or all of Beehive's interstate terminating access charges. Beehive Answer at 3-4, ¶ 12; Beehive Initial Brief at 6. Five months later, on December 5, 1995, Beehive filed suit against AT&T in federal district court in Utah seeking to recover access charges allegedly withheld unlawfully by AT&T (the "Utah Court Action"). Beehive Answer at 3-4, ¶ 12; Beehive Initial Brief at 6. On January 5, 1996, pursuant to Fed.R.Civ.P. 12(b), AT&T filed, in lieu of an answer, a motion to dismiss or stay the complaint on primary jurisdiction grounds. See *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Reply Brief of AT&T Corp., File No. E-97-04 (filed July 2, 1997) ("AT&T Reply Brief") at Exhibits C, D. On April 29, 1997, the federal district court stayed the Utah Court Action pending a ruling by the Commission in this proceeding. *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Letter from Peter H. Jacoby, Counsel for AT&T Corp., to Greg Lipscomb, Attorney, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau, FCC, File No. E-97-04 (dated May 6, 1997), Attachment; AT&T Reply Brief at 14-15.

²³ AT&T Complaint at 3-4, ¶ 9; Beehive Answer at 2-3, ¶ 9; AT&T Initial Brief at 3.

²⁴ Beehive Initial Brief at 4 n.4; AT&T Initial Brief at Exhibit 4 (Defendant's Response to Complainant's First Set of Interrogatories), Response to Interrogatory No. 1.

²⁵ *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Reply Brief For Defendants, File No. E-97-04 (filed July 2, 1997) at 6 ("Beehive Reply Brief").

III. DISCUSSION

A. Beehive Violated Section 203(c) of the Act By Imposing Access Charges on AT&T For Unsuccessful Call Attempts.

7. AT&T alleges — and Beehive admits — that Beehive charged AT&T for terminating unsuccessful long-distance call attempts, *i.e.*, calls that did not terminate to the end user, due to either a “no answer” or “busy signal” at the called number.²⁶ AT&T maintains that this practice contradicted the terms of Beehive’s Tariff, in violation of section 203(c).²⁷ For the following reasons, we agree.

8. As the parties acknowledge, Beehive “was absolutely bound by section 203(c) . . . to provide access services in exact accordance with its tariff.”²⁸ The parties also agree that section 2.6 of NECA Tariff F.C.C. No. 5 governed whether Beehive could properly impose access charges for terminating unsuccessful call attempts.²⁹ This Tariff section provided, in pertinent part:

For the purpose of calculating chargeable usage, the term ‘Access Minutes’ denotes customer usage of exchange facilities in the provision of interstate or foreign service. . . . On the terminating end of an interstate or foreign call, usage is measured from the time the call is *received* by the end user in the terminating exchange. Timing of usage at both originating and terminating ends of an interstate or foreign call shall terminate when the calling or called party disconnects, whichever event is recognized first in the originating and terminating exchanges, as applicable.³⁰

²⁶ AT&T Complaint at 5, 11-12, ¶¶ 14, 43-47; Beehive Answer at 4, ¶ 14; Beehive Initial Brief at 23-24. *See* AT&T Initial Brief at 23-26; AT&T Reply Brief at 24-25.

²⁷ AT&T Complaint at 11-12, ¶¶ 43-47; AT&T Initial Brief at 23-26.

²⁸ Beehive Initial Brief at 11. *See, e.g., Public Service Enterprises of Pennsylvania, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 10 FCC Rcd 8390, 8402 (1995) (stating that “[s]ection 203 is intended primarily to insure that carriers file all rates and regulations in their tariffs and abide by them upon all occasions.”), *vacated and remanded on other grounds, AT&T Corp. v. FCC*, 86 F.3d 242 (1996). *See also Philippine Long Distance Telephone v. World Communications, Inc.*, Order and Notice of Apparent Liability for Forfeitures, 8 FCC Rcd 755, 759 n.35 (1993), *recon. granted on other grounds, Philippine Long Distance Telephone v. World Communications, Inc.*, Order, 13 FCC Rcd 21520 (1998).

²⁹ *See* AT&T Complaint at 11, ¶ 44; Beehive Answer at 7-8, ¶ 44; Beehive Initial Brief at 23-24; AT&T Initial Brief at 22. We note that AT&T failed to enter into the record section 2.6 of NECA Tariff F.C.C. No. 5. This did not violate any existing rule, however. At the time the complaint was filed in this proceeding, section 1.720(h) of the Commission’s rules merely encouraged parties to provide copies of any relevant tariff provisions. 47 C.F.R. § 1.720(h) (1996). This rule has since been revised to *require* that parties provide copies of relevant tariff provisions. 47 C.F.R. § 1.720(h) (2001).

³⁰ NECA Tariff F.C.C. No. 5, Section 2.6, Definitions, Access Minutes (emphasis added). Because

9. We interpret this Tariff provision to mean that usage for which Beehive may impose access charges on AT&T does not begin to accrue until a called party “receives” a call. Under this provision, a called party does not “receive” a call that goes uncompleted (generally due to a no answer or busy signal at the called number); rather, a called party “receives” a call only when that party actually answers it. Our interpretation of the tariff term “receive” comports with the common understanding of the word. For example, the dictionary definition of “receive” is, in pertinent part: “1. take or accept (something offered or given) into one’s hands or possession. . . . 3. accept delivery of (something sent).”³¹ A called party does not “take”, “accept”, or “accept delivery of” a call until he/she answers it. Thus, under the pertinent tariff provision, an uncompleted call generates no usage for which Beehive may impose access charges on AT&T.

10. To try to counter this reading, Beehive only points out that, under the Tariff, the timing of usage “terminate[s] when the *calling or* called party disconnects. . . .”³² Based on this observation, Beehive argues that it can, in fact, charge for uncompleted calls, because a calling party can “disconnect” a call even when the called party never picks up.³³ This reading of the Tariff fatally ignores the fact that the standard for determining when usage *terminates* does not even apply unless and until the standard for determining when usage *begins* has been met. As explained above, an uncompleted call does not meet that latter standard. Consequently, Beehive’s practice of imposing access charges on AT&T for terminating uncompleted calls violated Beehive’s Tariff and, thus, section 203(c) of the Act.

11. AT&T’s Complaint requests an order requiring Beehive “to refund AT&T all amounts which [Beehive] has unlawfully charged [AT&T] in connection with” uncompleted calls.³⁴ However, AT&T has neither submitted evidence regarding the appropriate amount of such a refund, nor sought bifurcation of this proceeding to make a complete damages showing in a subsequent action.³⁵ Perhaps this is because the parties have agreed to an arbitration mechanism to resolve billing disputes, or because AT&T can assert these unlawful charges as a claim or an offset in the Utah Court Action.³⁶ In any event, based on this record, we find that

neither party submitted into the record the version of section 2.6 of NECA Tariff F.C.C. No. 5 that was effective during the relevant period, we quote from the currently effective version of NECA Tariff No. 5 (which is available on the Commission web site at <http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/ccb/etfs/webpublic/search.htm>), and assume that the current version does not materially differ from the version in effect at the relevant time.

³¹ The Oxford American Dictionary of Current English (Oxford University Press 1999) at 665.

³² Beehive Initial Brief at 23, *quoting* NECA Tariff F.C.C. No. 5, § 2.6 at 2-61 (emphasis added).

³³ Beehive Initial Brief at 23-24.

³⁴ AT&T Complaint at 13.

³⁵ *See* 47 C.F.R. § 1.722 (1996).

³⁶ Beehive Initial Brief at 22; AT&T Reply Brief at 23-24; Beehive Reply Brief at 27.

AT&T has established that Beehive's conduct regarding uncompleted calls violated section 203(c) of the Act but has not proven damages.³⁷

12. Accordingly, we grant Count Nine of AT&T's Complaint as to liability, but deny Count Nine as to damages.³⁸ We express no opinion, however, as to whether AT&T may pursue a damages claim in the Utah Court Action or in the parties' arbitration.³⁹

B. Beehive Violated Section 203(c) of the Act By Failing to Comply With Certain Other Billing Requirements of Its Tariff.

13. AT&T argues that Beehive violated section 203(c) of the Act by "consistently and intentionally"⁴⁰ submitting bills to AT&T for access services that were "seriously inaccurate,"⁴¹ confusing, and non-compliant with the billing requirements of Beehive's own Tariff.⁴² According to AT&T, the most egregious problems were "inconsistent and overlapping time periods contained in each bill and the intentionally deceptive manner in which Beehive identifies the days on which terminating usage accrued."⁴³ Specifically, AT&T maintains that Beehive's bill dates varied, Beehive's billing periods ranged from three days to thirty-eight days, Beehive's bills often included charges for usage incurred outside the billing period, and Beehive billed some days twice or not at all.⁴⁴ Moreover, AT&T asserts that Beehive identified some of the dates on its bills through the use of the Julian calendar, instead of the modern calendar, which is known as the Gregorian calendar.⁴⁵ According to AT&T, the Julian calendar is approximately

³⁷ Beehive alleges that the Filed Rate Doctrine bars AT&T's claim of overcharges based on charges for uncompleted calls. Beehive Answer at 8, ¶¶ 50-52. This defense is patently meritless. To the extent that Beehive billed AT&T in violation of its Tariff and the Act, the Filed Rate Doctrine provides no shelter. *See, e.g., AT&T Corp. v. Business Telecom, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 12312, 12317-18, ¶ 9 (2001).

³⁸ In addition, we dismiss as moot Count Eight of AT&T's Complaint because, although based on section 201(b) rather than section 203(c), Count Eight is identical in all other material respects to Count Nine.

³⁹ This is because this proceeding stems from a primary jurisdiction referral. *See* paragraph 24, *infra*.

⁴⁰ AT&T Initial Brief at 19.

⁴¹ AT&T Initial Brief at 19.

⁴² AT&T Complaint at 5, 10-11, ¶¶ 13, 38-42.

⁴³ AT&T Initial Brief at 19. *See* AT&T Complaint at 5, ¶ 13.

⁴⁴ AT&T Complaint at 5, ¶ 13; AT&T Initial Brief at 19-23; AT&T Reply Brief at 22-23.

⁴⁵ AT&T Complaint at 5, ¶ 13; AT&T Initial Brief at 20; AT&T Reply Brief at 23. The Julian calendar was adopted by Julius Caesar in 46 B.C.E. The Julian calendar closely resembles the Gregorian calendar, as both derive from 365 days divided into twelve months. By the thirteenth century, however, scholars realized that the Julian calendar included a minor flaw, which resulted in the calendar slowly becoming out of sync with the solar year. The flaw was this: under the Julian calendar, a year was 365.25 days long (*i.e.*, an extra day was inserted

13 days ahead of the Gregorian calendar, and has not been observed since the 16th century.⁴⁶ As evidence of all these practices, AT&T submits three bills it received from Beehive and an AT&T staff analysis of alleged discrepancies in 173 Beehive bills (“AT&T Chart”).⁴⁷

14. As explained above, section 203(c) of the Act requires that a carrier adhere to the terms of its published tariff.⁴⁸ As also explained above, Beehive’s Tariff incorporated by reference the non-rate terms and conditions set forth in NECA Tariff F.C.C. No. 5.⁴⁹ That Tariff clearly specified that the minimum billing period would be one month; that Beehive would establish a uniform bill date each month that would not change except upon sixty days’ notice to AT&T; and that Beehive would not double-bill for the same usage.⁵⁰ Beehive admits that it failed to comply with the first two of these requirements.⁵¹ Beehive explains that it could not adhere to a standard billing cycle of at least one month because (i) it depended on data from US West, which data often arrived out of sequence and overdue, and (ii) its billing systems experienced problems.⁵² Even if factually correct, these explanations do not excuse Beehive

every fourth year, typically known as a “leap year”). This significantly differs from the “real” length of the solar year, which is approximately 365.242199 days long. This error amounted to slightly more than 11 minutes per year. As a result, as the centuries passed, the Julian calendar became increasingly inaccurate with respect to the seasons. By the 16th century, the Julian calendar was running nearly two weeks late. To fix this growing problem, astronomers proposed eliminating ten days from the calendar and changing the rules regarding leap years. Pope Gregory XIII adopted this proposal in 1582. Thus, under the Gregorian calendar, “leap year” is skipped three times every four hundred years. *See* “Calendar,” 15 *ENCYCLOPEDIA BRITANNICA* 432, 444-46 (15th ed., 1991); Peter Meyer, “The Julian and Gregorian Calendars,” http://serendipity.magnet.ch/hermetic/cal_stud/cal_art.htm; L. E. Doggett, “Calendars,” <http://astro.nmsu.edu/~lhuber/leaphist.html>.

⁴⁶ AT&T Complaint at 5, ¶ 13; AT&T Initial Brief at 20. AT&T is incorrect. Although Pope Gregory XIII issued a papal decree establishing the Gregorian calendar in 1582, several nations continued to use the Julian calendar for some time thereafter. For example, Britain (and the British colonies, such as America) continued to use the Julian calendar until 1752. Other countries that continued to use the Julian calendar include Sweden (switched in 1753), Japan (1873), Egypt (1875), the Soviet Union (1918), and Turkey (1927), to name just a few. Alaska retained the Julian calendar until 1867, when it was transferred from Russia to the United States. *See* “Calendar,” 15 *ENCYCLOPEDIA BRITANNICA* 432, 444-46 (15th ed., 1991); Peter Meyer, “The Julian and Gregorian Calendars,” http://serendipity.magnet.ch/hermetic/cal_stud/cal_art.htm.

⁴⁷ AT&T Reply Brief at Exhibit I; AT&T Initial Brief at Exhibit 3, Attachment A.

⁴⁸ 47 U.S.C. § 203(c). *See* n.28, *supra*.

⁴⁹ *See* ¶ 8 and n.29, *supra*.

⁵⁰ NECA Tariff F.C.C. No. 5, sections 2.4.1, 2.4.2 (appended to AT&T’s Initial Brief at Exhibit 7). Although no provision of the NECA tariff expressly prohibits double billing, this duty is implied throughout section 2.4.1. For example, section 2.4.1(B) states that Beehive “shall bill on a current basis all charges incurred by and credits due to the customer under this tariff . . .” NECA Tariff F.C.C. No. 5, section 2.4.1(B).

⁵¹ *See* AT&T Initial Brief at Exhibit 4, Response to Interrogatory No. 10. For example, three Beehive bills submitted into the record by AT&T indicate billing periods of six, five, and four days. *See* AT&T Reply Brief at Exhibit I.

⁵² Beehive Reply Brief at 26.

from the obligation to comply with its Tariff. Moreover, AT&T has submitted substantial evidence of numerous and prolonged billing errors, which Beehive does not refute.⁵³ Thus, AT&T has met its burden of proving that Beehive violated section 203 of the Act by committing numerous billing errors and by failing to adhere to a standard billing cycle of at least one month.⁵⁴

15. We further find, however, that the record fails to support a finding that Beehive committed anything more than a *de minimus* violation of either section 203(c) or 201(b) by rendering access bills based upon the Julian calendar. The evidence submitted by AT&T is underwhelming. There is no allegation (much less proof) that any of the three bills submitted by AT&T into the record fails to properly identify the billing period based upon the Gregorian calendar.⁵⁵ Moreover, the AT&T Chart that purports to summarize errors discovered on 173 bills indicates that almost all of those bills expressed dates based upon both the Julian and Gregorian calendars.⁵⁶ Finally, although Beehive admits that it submitted five invoices to AT&T between February and May 1995 that referred only to Julian calendar dates, Beehive denies that this practice continued thereafter,⁵⁷ and there is no evidence in the record to the contrary. Thus, assuming, *arguendo*, that billing based solely on the Julian calendar would violate sections 201(b) and 203(c), we conclude that any such violations here were too trivial to warrant any adverse Commission finding.⁵⁸

16. In sum, we conclude that AT&T has met its burden of proving that Beehive violated section 203 with respect to all of the billing practices alleged, except the use of the Julian calendar. Therefore, we largely grant and partially deny Counts Six and Seven of AT&T's Complaint accordingly.⁵⁹ We note that AT&T neither requested nor sought to prove damages arising from the billing practices alleged in Counts Six and Seven.

C. Beehive's Access Rates Violated Section 201(b) by Generating Earnings Above the Prescribed Rate of Return in 1994, 1995, and 1996.

⁵³ See AT&T Initial Brief at Exhibit 3, Attachment A.

⁵⁴ Because of this holding, we dismiss as moot AT&T's claim in Count Seven that Beehive violated section 201(b), based on the same conduct.

⁵⁵ See AT&T Reply Brief at Exhibit I.

⁵⁶ See AT&T Initial Brief at Exhibit 3, Attachment A.

⁵⁷ Beehive Answer at 4, ¶ 13.

⁵⁸ In order to minimize uncertainty and confusion in interstate access billing matters, we strongly encourage carriers to use the standard, generally accepted calendar.

⁵⁹ Beehive alleges that the Filed Rate Doctrine bars AT&T's claims of unlawful billing practices. Beehive Answer at 8, ¶¶ 50-52. This defense is patently meritless. See *supra*, n.37.

17. AT&T alleges that Beehive's \$.47 per minute and \$.14 per minute rates for terminating interstate access services violated section 201(b) of the Act, because they caused Beehive to exceed its prescribed rate of return of 11.25% in 1994, 1995, and 1996.⁶⁰ AT&T did very little to seek or submit in this proceeding's record evidence to substantiate its allegations of overearnings.⁶¹ AT&T did eventually request, however, that we take official notice of Beehive's acknowledgment in another Commission proceeding that Beehive's interstate access charges exceeded the prescribed rate of return in 1994, 1995, and 1996.⁶² For the reasons explained below, we accede to AT&T's request and, as a result, conclude that AT&T has met its burden of showing that Beehive exceeded the prescribed rate of return in 1994, 1995, and 1996.

18. On August 5, 1997, pursuant to section 204(a) of the Act,⁶³ the Common Carrier Bureau's Competitive Pricing Division suspended the interstate access tariff that Beehive had belatedly filed on July 22, 1997 for the 1997-1999 period ("Transmittal No. 6").⁶⁴ In doing so, the Suspension Order stated that Transmittal No. 6 raised "significant questions of lawfulness" about, *inter alia*, whether it contained rates violative of section 201(b) of the Act.⁶⁵ On December 2, 1997, the Common Carrier Bureau designated for investigation various issues regarding Transmittal No. 6 and directed Beehive to provide to the Commission detailed information concerning its costs and revenues during 1994, 1995, and 1996.⁶⁶

19. On December 15, 1997, in response to the Designation Order, Beehive submitted to the Commission its "Direct Case" containing cost and revenue information for 1994, 1995, and 1996.⁶⁷ This information indicated that, for interstate services, Beehive had earned a

⁶⁰ AT&T Complaint at 9-10, ¶¶ 28-37; AT&T Initial Brief at 26-29; AT&T Reply Brief at 20-22; *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Initial Brief of AT&T Corp., File Nos. E-97-04, E-97-14 (filed Apr. 20, 1998) at 8-11, 24-15 ("AT&T Supplemental Brief"); *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Reply Brief of AT&T Corp., File Nos. E-97-04, E-97-14 (filed May 4, 1998) at 7-13 ("AT&T Supplemental Reply Brief"). See *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Order, 5 FCC Rcd 7507, 7509, ¶ 13 (1990) (prescribing a rate of return of 11.25% for certain incumbent LECs, including Beehive).

⁶¹ See generally AT&T Reply Brief at 20-22 (acknowledging that, based on the record evidence at that time, the Commission could not be "completely certain" that Beehive had exceeded its prescribed rate of return).

⁶² AT&T Supplemental Brief at 24-25; AT&T Supplemental Reply Brief at 3-11.

⁶³ 47 U.S.C. § 204(a) (authorizing the Commission to suspend a tariff and to determine whether new or revised charges contained in the tariff are just and reasonable).

⁶⁴ *Beehive Telephone Co., Inc., Tariff F.C.C. No. 1, Transmittal No. 6*, Suspension Order, 12 FCC Rcd 11695 (Com. Car. Bur., Com. Pric. Div. 1997) ("*Suspension Order*").

⁶⁵ *Suspension Order*, 12 FCC Rcd at 11697, ¶ 6.

⁶⁶ *Beehive Telephone Co., Inc., Tariff F.C.C. No. 1, Transmittal No. 6*, Order Designating Issues for Investigation, 12 FCC Rcd 20249 (Com. Car. Bur. 1997) ("*Designation Order*").

⁶⁷ *Beehive Telephone Co., Inc., Tariff F.C.C. No. 1, Transmittal No. 6*, Direct Case, CC Docket No.

15.18% rate of return in 1994, a 62.60% rate of return in 1995, and a 67.95% rate of return in 1996, all well above the prescribed rate of return of 11.25%.⁶⁸ Two weeks later, on December 29, 1997, Beehive filed another pleading in that proceeding acknowledging the accuracy of those excessive rates of return.⁶⁹

20. The Commission has broad discretion in its adjudicatory proceedings to take official notice of factual issues “related directly to the agency’s expertise or relate[d] to certain aspects of the parties’ situation of which the commission has a good deal of prior knowledge.”⁷⁰ The historic rate-of-return information submitted by Beehive in the Commission’s investigation of Beehive’s Transmittal No. 6 falls well within such discretion.⁷¹ Consequently, we agree with AT&T that we should take official notice of Beehive’s acknowledgement in the Commission’s proceeding investigating Beehive’s Transmittal No. 6 that Beehive exceeded its prescribed interstate access rate of return in 1994, 1995, and 1996.

21. Beehive proffers several reasons why we should refrain from considering AT&T’s overearnings claims or taking official notice of Beehive’s prior statements that Beehive exceeded its prescribed interstate access rate of return in 1994, 1995, and 1996.⁷² All of those reasons lack merit.

97-237 (filed Dec. 15, 1997) (“Direct Case”).

⁶⁸ Direct Case at 4, 7, 11.

⁶⁹ *Beehive Telephone Co., Inc., Tariff F.C.C. No. 1, Transmittal No. 6*, Rebuttal to Opposition to Direct Case, CC Docket No. 97-237 (filed Dec. 29, 1997) at 13 (“Rebuttal”). The Commission ultimately determined that Beehive’s switching rates in Transmittal No. 6 were excessive, and thus prescribed lower switching rates and ordered refunds. *Beehive Telephone Co., Inc., Tariff F.C.C. No. 1, Transmittal No. 6*, Memorandum Opinion and Order, 13 FCC Rcd 2736 (1998) (“*Refund Order*”), *modified on recon.*, Order on Reconsideration, 13 FCC Rcd 11795 (1998), *aff’d*, *Beehive Telephone Co., Inc. v. FCC*, 180 F.3d 314 (1999). In so ruling, the Commission determined that Beehive’s rate of return on switching alone was 12.2% in 1994, 111% in 1995, and 65% in 1996. *Refund Order*, 13 FCC Rcd at 2741, ¶ 13.

⁷⁰ Aman & Mayton, *Administrative Law* § 8.4.8 at 232 (West 1993). See 5 U.S.C. § 556(e); 47 C.F.R. §§ 1.361, 1.727(b); Fed. R. Evid. 201.

⁷¹ See, e.g., *Bachow/Coastel, L.L.C. v. GTE Wireless of the South, Inc.*, Order on Review, 16 FCC Rcd 4967, 4968-69, ¶ 5 (2001); *In Re Applications of Chesapeake and Potomac Company of Virginia*, Memorandum Opinion and Order, 98 F.C.C. 2d 238, 239 n.4 (1984); *Revision of the Processing Policies for Waivers of the Telephone Company-Cable Television “Cross Ownership Rules,”* Memorandum Opinion and Order, 82 F.C.C. 2d 254, 260-61 & n.6 (1980), *recon. granted in part on other grounds*, *Revision of the Processing Policies for Waivers of the Telephone Company-Cable Television “Cross Ownership Rules,”* Memorandum Opinion and Order, 86 FCC 2d 983 (1981).

⁷² *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Supplemental Brief for Defendants in File No. E-97-04 and Initial Brief for Complainants in File No. E-97-14, File Nos. E-97-04, E-97-14 (filed Apr. 20, 1998) at 17-26 (“*Beehive Supplemental Brief*”); *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Reply Brief, File Nos. E-97-04, E-97-14 (filed May 4, 1998) at 8-12, 27-28 (“*Beehive Supplemental Reply Brief*”).

22. First, Beehive argues that the two-year statute of limitations in section 415(c) of the Act⁷³ bars AT&T's claim regarding Beehive's \$.47 rate, because AT&T knew or should have known of the grounds for the claim when the rate took effect on July 1, 1994, more than two years before AT&T filed its complaint on October 29, 1996.⁷⁴ Beehive argues that section 415 also bars AT&T's claim regarding Beehive's \$.14 rate, because AT&T knew or should have known of the grounds for the claim when the rate took effect on July 1, 1995, more than two years before AT&T submitted supporting evidence on July 2, 1997.⁷⁵ It is well established, however, that the statute of limitations on a claim alleging overearnings does not even begin to run until the defendant carrier files with the Commission final information indicating that it did, in fact, overearn during a particular period.⁷⁶ The record contains no evidence that Beehive filed such information with the Commission more than two years before AT&T filed the instant complaint.⁷⁷ Thus, Beehive's statute of limitations defense fails.⁷⁸

23. Second, Beehive maintains that we should not take official notice of information submitted in the Commission's investigation of Transmittal No. 6, because such submissions occurred after a statutory deadline for resolving AT&T's claims in this proceeding had lapsed.⁷⁹ Even assuming, *arguendo*, the validity of Beehive's premise, Beehive's conclusion does not follow. It is well established that the expiration of a statutory deadline for the Commission to act does not divest the Commission of authority to continue moving toward resolution of a proceeding.⁸⁰ Accordingly, we have authority to take official notice of information submitted in the Commission's investigation of Transmittal No. 6, whether or not such submissions occurred

⁷³ 47 U.S.C. § 415.

⁷⁴ Beehive Supplemental Brief at 17-20; Beehive Supplemental Reply Brief at 22.

⁷⁵ Beehive Supplemental Brief at 20-23.

⁷⁶ See, e.g., *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1416-17 (D.C. Cir. 1995), *cert. dismissed sub nom. BellSouth Telecommunications, Inc. v. FCC*, 517 U.S. 1129 (1996), *cert. denied sub nom. BellSouth Telecommunications, Inc. v. FCC*, 517 U.S. 1240 (1996); *General Communication, Inc. v. Alaska Communications Systems Holdings, Inc., et al.*, Memorandum Opinion and Order, 16 FCC Rcd 2834, 2860-61, ¶¶ 67-68 (2001), *appeal pending*, *ACS of Anchorage, Inc. v. Federal Communications Commission*, No. 01-1059 (D.C. Cir., filed Feb. 7, 2001).

⁷⁷ See generally 47 C.F.R. § 65.600 (requiring local exchange carriers not subject to price cap regulation to file with the Commission an annual rate-of-return monitoring report).

⁷⁸ For the same reasons, Beehive's laches defense also fails. Answer at 9-12, ¶¶ 57-71.

⁷⁹ Beehive Supplemental Brief at 20-23 (citing 47 U.S.C. § 208(b)(1)).

⁸⁰ See, e.g., *Contract Freighters, Inc. v. Dep't of Transportation*, 260 F.3d 858, 860 n.3 (8th Cir. 2001); *Southwestern Bell Telephone Co. v. FCC*, 138 F.3d 746, 749-50 (8th Cir. 1998); *Gottlieb v. Pena*, 41 F.3d 730, 733-37 (D.C. Cir. 1994); *800 Data Base Access Tariffs and the 800 Service Management System Tariff*, Order on Reconsideration, 12 FCC Rcd 5188, 5193-94, ¶ 15 (1997).

after a statutory deadline for resolving AT&T's claims in this proceeding had lapsed.⁸¹ Thus, Beehive's statutory deadline defense fails.

24. Third, Beehive contends that section 207 of the Act bars AT&T's claims regarding the lawfulness of Beehive's rates, because AT&T previously alleged the unlawfulness of Beehive's rates as a defense in the Utah Court Action.⁸² Section 207 provides, in pertinent part, that "[a]ny person claiming to be damaged by any common carrier . . . may either make complaint to the Commission . . . or may bring suit for the recovery of the damages for which such common carrier may be liable . . . in any district court of the United States . . .; but such person shall not have the right to pursue both such remedies."⁸³ Beehive overlooks the key facts, however, that AT&T raised this defense in the context of a motion to dismiss or stay the matter on primary jurisdiction grounds,⁸⁴ and that ultimately the federal court essentially granted AT&T's motion.⁸⁵ It is well established that section 207 does not apply in the context of a primary jurisdiction referral.⁸⁶ Thus, Beehive's section 207 defense fails.⁸⁷

25. Fourth, Beehive asserts that we should not look to the Commission's investigation of Transmittal No. 6 for any purpose here, because the procedural rules governing the investigation were ad hoc and different from formal complaint procedures; the investigation included ex parte presentations; the investigation proceeded on an unlawfully abbreviated schedule; the investigation concerned Beehive's 1997 interstate switching rates, not its 1994-1996 overall access rates; and the investigation record contained no data concerning Beehive's

⁸¹ Given this conclusion, we need not and do not decide whether the submissions at issue here occurred after a statutory deadline for resolving AT&T's claims in this proceeding had lapsed.

⁸² 47 U.S.C. § 207. See Beehive Initial Brief at 15-16.

⁸³ 47 U.S.C. § 207.

⁸⁴ AT&T Reply Brief at Exhibits D, C.

⁸⁵ *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Letter from Peter H. Jacoby, Counsel for AT&T Corp., to Greg Lipscomb, Attorney, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau, FCC, File No. E-97-04 (dated May 6, 1997), Attachment. See Beehive Initial Brief at 10; AT&T Reply Brief at 14-15.

⁸⁶ See, e.g., *Allnet Communication Service, Inc. v. National Exchange Carrier Association, Inc.*, 965 F.2d 1118, 1122 (D.C. Cir. 1992).

⁸⁷ It is true that AT&T filed its complaint here perhaps a bit prematurely, a few months before the federal court granted AT&T's primary jurisdiction motion. At this point, however, long after the court has granted AT&T's motion, dismissing AT&T's complaint on that basis would unduly exalt form over substance. This is especially true, given that Beehive has alleged no prejudice arising from AT&T's filing of the complaint in anticipation of the court's order granting referral. Indeed, section 207 might not even apply here, because AT&T raised the issue of rate reasonableness in the context of a Rule 12(b) motion, not in the context of an affirmative defense or counterclaim. Nevertheless, we caution future complainants that the mere filing of a primary jurisdiction motion in court does not vitiate section 207 concerns.

costs and demand in 1993.⁸⁸ All of these assertions miss the point.⁸⁹ None of these assertions changes the fact that, during the course of the Commission's investigation of Transmittal No. 6, Beehive itself submitted information to the Commission clearly indicating that Beehive exceeded its prescribed interstate access rate of return in 1994, 1995, and 1996; and Beehive has shown nothing in the investigation proceeding or in this proceeding that undermines the validity of Beehive's submissions. Thus, Beehive's defense based on the nature and content of the Commission's investigation of Transmittal No. 6 fails.

26. Finally, Beehive argues that AT&T cannot challenge the lawfulness of Beehive's interstate access rates in 1995-1996, because AT&T refused during that time to first pay all of the charges based on those rates.⁹⁰ Beehive's argument fatally ignores the fact that its own Tariff contemplates that a customer may withhold payment of disputed charges pending resolution of the dispute.⁹¹ Under the filed rate doctrine, therefore, Beehive's argument fails.⁹²

27. In sum, Beehive presents no valid argument why we should refrain from considering AT&T's overearnings claims and taking official notice of information submitted by Beehive during the Commission's investigation of Transmittal No. 6. Consequently, we take official notice of the fact that, according to Beehive's own records, Beehive earned interstate access revenues above its prescribed rate of return in 1994, 1995, and 1996. Moreover, nothing in the record refutes this evidence. Thus, AT&T has met its burden of demonstrating that Beehive's access rates during those years were unjust and unreasonable, in violation of section 201(b) of the Act.⁹³

⁸⁸ Beehive Supplemental Brief at 23-26; Beehive Supplemental Reply Brief at 11-12, 27-28.

⁸⁹ We note that the D.C. Circuit affirmed the Commission's order concluding the investigation of Transmittal No. 6, which found that Beehive's interstate rate of return for local switching in 1994-1996 was excessive, and which rejected the "due process" arguments raised here. *Beehive Telephone Company, Inc., Tariff F.C.C. No. 1, Transmittal No. 6*, Memorandum Opinion and Order, 13 FCC Rcd 2736 (1998), *modified on recon.*, Order on Reconsideration, 13 FCC Rcd 11795 (1998), *aff'd*, *Beehive Telephone Co., Inc.*, 180 F.3d 314 (D.C. Cir. 1999).

⁹⁰ Beehive Initial Brief at 16-17.

⁹¹ NECA Tariff F.C.C. No. 5, section 2.4.1(D). Given this result, we need not decide whether Beehive's defense has any other flaws.

⁹² See, e.g., *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998). Beehive also seems to argue that the filed rate doctrine precludes AT&T from challenging the reasonableness of Beehive's tariffed access rates. Beehive Answer at 8, ¶¶ 50-52; Beehive Initial Brief at 16-17. That argument is patently meritless. It is well established that the Commission has the authority to determine the reasonableness of a tariffed rate in the context of a section 208 complaint proceeding. See, e.g., *AT&T Corp. v. Business Telecom, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 12312, 12317-20, ¶¶ 9-12 (2001).

⁹³ We must assess the lawfulness of Beehive's rates and earnings in 1994 in combination with Beehive's rates and earnings in 1993. See 47 C.F.R. §§ 65.600(b), 65.702(b). See also *Virgin Islands Telephone Corp. v. FCC*, 989 F.2d 1231 (D.C. Cir. 1993). Here, we conclude that Beehive's rates in 1994 were unlawful based, in part, on an assumption that Beehive did not materially underearn in 1993. This assumption is reasonable,

28. AT&T has not met its burden, however, of demonstrating the extent to which it was damaged by Beehive's unlawful rates. Although the record contains some pertinent information, the record does not contain everything needed to make a precise damage calculation. Moreover, nowhere in the record does AT&T explain exactly how much it believes we should award due to these violations or precisely how it would calculate such an amount based on record evidence. Thus, we grant AT&T's overearnings claims in Counts Four and Five of the Complaint as to liability, but deny those claims as to damages. Again, however, we express no opinion as to whether AT&T may pursue a damages claim in the Utah Court Action or in the parties' arbitration.⁹⁴

D. AT&T Has Not Demonstrated on This Record that the Access Revenue-Sharing Arrangement Between Beehive and Joy Violated Section 201(b) or 202(a) of the Act.

29. AT&T alleges in its Complaint that the access revenue-sharing arrangement between Beehive and Joy breached Beehive's common carrier duties, in violation of section 201(b) of the Act, and constituted unreasonable discrimination, in violation of section 202(a) of the Act.⁹⁵ AT&T's allegations and arguments are identical to those raised and denied in *AT&T v. Jefferson*⁹⁶ and *AT&T v. Frontier*.⁹⁷ Thus, for the reasons explained in those orders, we conclude that AT&T has failed on this record to meet its burden of demonstrating that Beehive violated either section 201(b) or section 202(a) of the Act.⁹⁸ Therefore, we deny Counts One,

because Beehive knew that AT&T was urging us to consider information regarding Beehive's rates and earnings in 1994, yet offered no evidence (such as monitoring reports) indicating that any overearnings in 1994 had been offset by underearnings in 1993. This assumption is especially appropriate because (i) Beehive participated in the NECA tariff during 1993 and half of 1994, and (ii) the record contains some evidence that Beehive actually overearned in the 1993-94 period. See AT&T Reply Brief at Exhibit H (a Beehive preliminary report indicating that its interstate rate of return during 1993-94 would be 16.93%). Beehive moves us to strike this (and other) evidence as untimely filed, *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Letter from Russell D. Lukas, Counsel for Beehive Telephone Co., to Greg Lipscomb, Attorney, Enforcement Division, Common Carrier Bureau, FCC, File No. E-97-04 (dated Jul. 16, 1997), but we deny that motion, because Beehive had ample opportunity in its briefs filed in 1998 to respond to this (and other) evidence, which AT&T filed in 1997.

⁹⁴ See n.39, *supra*.

⁹⁵ AT&T Complaint at 6-8, ¶¶ 16-27. See AT&T Initial Brief at 5-19; AT&T Reply Brief at 9-12, 15-20.

⁹⁶ *AT&T Corp. v. Jefferson Telephone Co.*, Memorandum Opinion and Order, 16 FCC Rcd 16130 (2001) ("*AT&T v. Jefferson*").

⁹⁷ *AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc. et al.*, Memorandum Opinion and Order, 17 FCC Rcd 4041 (2002) ("*AT&T v. Frontier*").

⁹⁸ See generally *Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000) (affirming that the complainant in a proceeding conducted under section 208 of the Act bears the burden of proof). We note that, although AT&T suggests that Beehive's corporate relationship with Joy was somehow improper, see, e.g., AT&T Initial Brief at 2, 5, AT&T asserts no claim on this basis.

Two, and Three of AT&T's Complaint.⁹⁹

E. Beehive's Complaint Lacks Merit.

30. In its Complaint, Beehive alleges that, if (and only if) the Commission were to find in this consolidated proceeding that its access revenue-sharing arrangement with Joy was unlawful, then the Commission must also find that AT&T's use of so-called Terminating Switched Access Arrangements ("TSAAs") with AT&T's end user customers is unlawful.¹⁰⁰ Elsewhere in this Order, we find that, based on the record in this proceeding, AT&T has failed to meet its burden of proving that Beehive's access revenue-sharing arrangement with Joy was unlawful.¹⁰¹ Therefore, the condition precedent pled by Beehive has not been satisfied, and Beehive's claims must fail.¹⁰² Accordingly, we dismiss the First and Second Causes of Action of Beehive's Complaint.¹⁰³

31. Beehive further alleges that, if (and only if) the Commission were to find in a

⁹⁹ Moreover, we decline to reach two issues that AT&T raised for the first time in its briefs, because the tardy raising of these issues renders the record insufficient to permit a reasoned decision. *See, e.g., AT&T v. Jefferson*, 16 FCC Rcd at 16133 n.18; *Consumer.Net v. AT&T Corp.*, Order, 15 FCC Rcd 281, 300, ¶ 40 n.93 (1999) (declining to consider an argument raised for the first time in the briefs). *Cf., Building Owners and Managers Association International v. FCC*, 254 F.3d 89, 100 n.14 (D.C. Cir. 2001) (declining to address an issue raised cursorily in the brief). Specifically, in its briefs, AT&T maintains for the first time that the revenue-sharing arrangement between Beehive and Joy also violated section 201(b) by "evading the requirements" of TDDRA. AT&T Initial Brief at 14-16; AT&T Reply Brief at 9-12. In addition, in its briefs, AT&T argues for the first time that Beehive's practice of billing AT&T for traffic terminated to Joy violated the Commission's tariff regulations. AT&T Initial Brief at 10-13; AT&T Reply Brief at 8-9.

¹⁰⁰ Beehive Complaint at 2, 9-10, 12-13, ¶¶ 5, 34-40, 54-61. *See* Beehive Supplemental Brief at 26-30; Beehive Supplemental Reply Brief at 12-18; *Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada v. AT&T Corp.*, Opposition to Motion to Dismiss, File No. E-97-14 (filed June 4, 1997) at 4-5.

¹⁰¹ *See* section III.D, *supra*.

¹⁰² Beehive filed a petition for reconsideration of a staff discovery ruling regarding information about AT&T's TSAAs. *Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada v. AT&T Corp.*, Petition For Reconsideration, File No. E-97-14 (filed Mar. 26, 1998); *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, and *Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada v. AT&T Corp.*, Letter from Deena M. Shetler, Attorney, Enforcement Division, Common Carrier Bureau, FCC, to Peter H. Jacoby, Counsel for AT&T Corp., and Russell D. Lukas, Counsel for Beehive Telephone Co., File Nos. E-97-04, E-97-14 (dated Mar. 16, 1998); *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, and *Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada v. AT&T Corp.*, Letter from Deena M. Shetler, Attorney, Enforcement Division, Common Carrier Bureau, FCC, to Peter H. Jacoby, Counsel for AT&T Corp., and Russell D. Lukas, Counsel for Beehive Telephone Co., File Nos. E-97-04, E-97-14 (dated Mar. 24, 1998). As this Order makes clear, such information was not germane to our resolution of any of the claims by either party. Thus, we dismiss Beehive's petition as moot.

¹⁰³ Because we dismiss these claims on other grounds, we need not reach the arguably antecedent question whether these claims should be dismissed due to their conditional nature.

different pending proceeding that a similar access revenue-sharing arrangement between another carrier (Total Telecommunications Services, Inc.) and an information provider was an unlawful attempt to evade the requirements TDDRA, then the Commission must also find that AT&T's use of TSAAs constituted an unlawful evasion of TDDRA, as well.¹⁰⁴ In *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, we rejected this TDDRA claim as moot,¹⁰⁵ and AT&T did not raise a TDDRA claim in its Complaint here. Therefore, again, the condition precedent pled by Beehive has not been satisfied, so Beehive's claim must fail. Accordingly, we dismiss the Fifth Cause of Action of Beehive's Complaint.¹⁰⁶

32. Finally, Beehive alleges that AT&T concealed material facts in this complaint proceeding, in violation of sections 1.17 and 1.729(b) of the Commission's rules.¹⁰⁷ These facts dealt with the existence and details of certain of AT&T's TSAAs. Based on our review of the entire record in this proceeding, we conclude that Beehive has failed to meet its burden of proving that AT&T willfully withheld material information. Accordingly, we deny the Third and Fourth Causes of Action of Beehive's Complaint.¹⁰⁸

IV. ORDERING CLAUSES

33. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201(b), 202(a), 203(c), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 202(a), 203(c), and 208, that the above-captioned complaint filed by AT&T IS GRANTED IN PART AND DISMISSED OR DENIED IN PART to the extent described herein.

34. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201(b), 202(a), 203(c), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j),

¹⁰⁴ Beehive Complaint at 12-13, ¶¶ 54-61. See Beehive Supplemental Brief at 26-30; Beehive Supplemental Reply Brief at 18-19.

¹⁰⁵ *Total Telecommunications Services, Inc., and Atlas Telephone Company, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5726, 5744 ¶ 41 (2001), *appeal pending*, AT&T Corp. v. FCC, Case Nos. 01-1188, 01-1201 (D.C. Cir., filed Apr. 20, 2001).

¹⁰⁶ Again, because we dismiss this claim on other grounds, we need not reach the arguably antecedent question whether this claim should be dismissed due to its conditional nature.

¹⁰⁷ Beehive Complaint at 2, 10-11, ¶¶ 5, 41-53. See Beehive Supplemental Brief at 14-15, 30-32; Beehive Supplemental Reply Brief at 6-8, 23-27.

¹⁰⁸ Because we deny these claims on other grounds, we need not reach the arguably antecedent question whether alleged violations of sections 1.17 and 1.729(b) of our rules — which govern carriers' dealings with the Commission, not their provision of telecommunication services — state a claim under section 208 of the Act. In addition, because we deny Beehive's Complaint in its entirety, we also dismiss as moot AT&T's Motion to Dismiss Beehive's Complaint. See *AT&T Corp. v. Beehive Telephone Co., Inc. and Beehive Telephone Inc. Nevada*, Motion to Dismiss, File No. E-97-14 (filed May 20, 1997).

201(b), 202(a), 203(c), and 208, that the above-captioned complaint filed by Beehive IS DISMISSED AND DENIED IN ITS ENTIRETY WITH PREJUDICE.

35. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201(b), 202(a), 203(c), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 202(a), 203(c), and 208, that AT&T's May 20, 1997 Motion to Dismiss, Beehive's July 16, 1997 Motion to Strike, and Beehive's March 16, 1998 Petition for Reconsideration are DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary